

SECTION 11

CONTRACTING FOR FOOD SERVICES

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SALE OF COMMERCIALLY PREPARED FOOD ITEMS

Legal Arrangements

Sponsors may purchase items prepared off-site by commercial firms and include them in their meal service operation. Items may be incorporated into reimbursable meals or sold as a la carte items. A firm, which has a commercial catering license, such as fast food franchise, restaurant or bakery, may sell to a sponsor as a supplier or vendor. It is also permissible for a sponsor to enter into a franchise agreement with a commercial firm. The sponsor continues to operate the food service as a franchise, pays the firm for training, recipes, and the use of the company logo, but the food is prepared by the sponsor at the sponsor's site.

Proper procurement practices must be used prior to purchasing commercial food items for resale to students. A franchise agreement and the purchase of food products for use under a franchise agreement are also subject to competitive bidding requirements of the National School Lunch Program.

Under the National School Lunch Program, sponsors may not enter into Sales Agency Agreements with commercial firms to supply items as one part of a meal or as a la carte items. Therefore, under no conditions may a commercial company come into a school and sell product directly to students.

Meat and Poultry Inspection Requirement

USDA, Food Safety and Inspection Service (FSIS) is required by law to inspect commercially prepared meat items when they leave the commercial firm for resale through a school or other entity.

Currently, **two items are exempt** from federal meat and poultry inspection prior to resale. The items are meat pizzas and hot and cold sandwiches. These are the only two meat and poultry items which schools may purchase from a commercial firm. FSIS does not consider tacos as a sandwich therefore, they are not an exempt item. All other meat and poultry items must be inspected prior to resale. Questions related to meat and poultry inspection may be directed to the Arizona Department of Agriculture, (602) 542-4971.

CATERING CONTRACTS

It is required that the ADE-CNP prototype contract, Standard Agreement to Provide Food Service, be used when a NSLP and/or SBP sponsor enters into an agreement with a caterer for the preparation, delivery and/or pick up of unified meals with or without milk or juice, which will be claimed for reimbursement under the NSLP/ SBP. For this purpose, a caterer is defined as a commercial food service vendor.

If the catering contract is between two public agencies (i.e. a charter school and a public school district), the sponsor is allowed to use any customary form of contract used by the school district, if that form incorporates all the provisions set forth in 7 CFR 210 and/or 220 of the federal regulations. See the section on Inter-District Contracts on page 11.2 for more information on contracts between public agencies.

If the annual aggregate value of the food service contract is \$31,338.70 (FY 2001 figure, adjusted annually in the Uniform System of Financial Records- USFR) or more (\$35,000 or more for Charter Schools), formal bid contracting procedures, as outlined in 7 CFR Part 210 and OMB Circular A-102, Attachment O, are required. Documentation must be on file that the contracting procedure met the requirements for fair and open competition.

This contract must be signed by both the sponsor and the caterer, and contain the requirements outlined in the federal regulations. No deletions of clauses or items will be allowed without the approval of ADE. Additional clauses may be added to bring the contract in conformance with applicable State or local laws governing the sponsor. Either the sponsor or the caterer may add additional clauses.

The contract is valid from the date of signature until the end of the state fiscal year, June 30th. A new contract must be entered into annually. A copy of each annual contract must be submitted to ADE for review prior to beginning NSLP/SLP operations. Both the sponsor and the caterer must retain the completed contract and all amendments.

INTER-DISTRICT CONTRACTS

Inter-district contracts are required to be submitted to the CNP, where a school district operates the NSLP and the SBP in one or more sites in another district/charter school. In such a case one district would administer the school meals program for both districts. The administering district is responsible for submitting the contract to the CNP.

The districts must enter into a written contract, which clearly specifies the responsibilities each district has in administering the NSLP/SBP, including, but not limited to the following:

- The length of time the contract will be in effect
- Who is responsible for point-of-service counts
- Who will handle the free and reduced price application process
- Who will receive and approve applications
- Who will handle the verification process
- Who will assume the responsibility for any over-claims identified during a review or audit
- Who will perform the required edit checks
- Who will ultimately be responsible for meal count and claiming accountability
- The administering district includes the sites/schools in the application/contract with the state agency

FOOD SERVICE MANAGEMENT COMPANIES

Introduction

Under the Food Service Agreement, sponsors are responsible for operating the Child Nutrition Programs in schools under their jurisdiction. These programs include the National School Lunch Program (NSLP), School Breakfast Program (SBP), Special Milk Program (SMP), Summer Food Service Program (SFSP), and Child and Adult Care Food Program (CACFP). To assist in carrying out this responsibility, a sponsor may contract with a food service management company (FSMC) to manage its food service operation involving these programs in one or more of its schools or in schools under other administrators with which agreements for such service have been enacted.

In order to ensure that an FSMC will provide the sponsor with the best food service operation available, the sponsor must consider a number of issues. These issues include the financial, administrative and operational activities that will be affected by contracting. The sponsor should allow sufficient time to identify and analyze these issues and to prepare for conversion from operating the food service to using an FSMC. Ideally this process should start one full year before the FSMC begins operations.

In contracting with an FSMC, the sponsor will be responsible to the CNP office for settlement of all contractual and administrative issues arising out of the procurement. Therefore, the sponsor must utilize procurement procedures and bid documents that provide adequate safeguards for the sponsor as well as ensuring that the FSMC operates the food service in accordance with the objectives of the sponsor. Additionally, the sponsor should retain a sufficient number of knowledgeable staff to coordinate, monitor, review and control food service operations and to perform the responsibilities which must be retained by the sponsor.

CNP will not renew the sponsor agreement to operate any Child Nutrition Program until the Invitation for Bid (IFB), Request for Proposal (RFP), Contract or Addendum have been received and approved by the CNP office. Reimbursement will be withheld for any meals served to children by a Food Service Management Company until a signed copy of the approved contract or addendum is received by the CNP office.

A Food Service Management Company Guidance Manual is available upon request from the CNP office that identifies items which should be considered in deciding whether to use an FSMC, the actions which should be taken once a decision to use an FSMC has been made and the ongoing responsibilities of the sponsor after the FSMC contract becomes operational. Call your program specialist for a copy of the manual.

Responsibilities Retained by the Sponsor

Regardless of whether an FSMC is utilized, the sponsor remains responsible for the overall operation of the Child Nutrition Programs in its schools. This responsibility requires that the sponsor maintain direct involvement in the operation of the food service.

Sponsors must retain:

1. Signature authority on the agreement to participate in any Child Nutrition Program, including the sponsor's free and reduced-price statement;
2. Signature authority on the monthly reimbursement claim;

3. Development, distribution and collection of the parent letter and application for free and reduced-price meals and free milk;
4. Determination of eligibility for free and reduced-price meals and the conduct of any hearings related to such determinations;
5. Verification of applications for free and reduced-price meals;
6. Control of the school food service account and overall financial responsibility for the Child Nutrition Programs;
7. Establishment of all program and non-program meal and a la carte prices;
8. Title to United States Department of Agriculture donated foods;
9. Development of the 21-day cycle menus for the FSMC bid/proposal as well as changes to the cycle menu after the first 21 days of meal service;
10. Monitoring responsibilities under program regulations;
11. Establishment and maintenance of an advisory board composed of partners, teachers and students to assist in menu planning;
12. Maintenance of applicable health certifications and assurance that all state and local regulations are being met by an FSMC preparing or serving meals at a sponsor's facility;
13. Assurance that the maximum amount of USDA donated foods are received and utilized by the FSMC and accrue only to the benefit of the sponsor's non-profit food service account;
14. Control of the quality, extent and general nature of its food service;
15. Responsibility for all contractual agreements entered into in connection with the Child Nutrition Programs; and
16. Responsibility for ensuring resolution of program review and audit findings.

Considerations

When considering the use of an FSMC:

- ✓ Contact other school districts using FSMCs for information;
- ✓ Conduct an analysis of the current food service operation that would include:
 - - identifying the current cost of operating the food service;
 - - determining all cost elements which will be affected by contracting with an FSMC (i.e., personnel costs, food costs and other labor costs);

- - determining the maximum cost that can be incurred under an FSMC contract in order for the school food service to meet its goals;
- - analyzing all nonfiscal aspects of the current food service operation to determine the impact of utilizing an FSMC on these elements;
- - identifying what functions might be contracted;
- - determining what method of providing food service best meets the sponsor's goals and objectives;

- ✓ Determine the general extent or scope of work to be performed by the FSMC;

- ✓ Decide if the FSMC will cater any special activities and/or be involved in any other food service activity outside the nonprofit food service;

- ✓ Identify in which federally reimbursable programs or other nonprofit food service activities the FSMC will be involved. For example: the NSLP, a la carte sales during and/or between meal service periods, after hour snacks or meal/snack service under the Child and Adult Care Food Program, Summer Food Service Program and other food service operations that are conducted principally for the benefit of children;

- ✓ Identify sponsor personnel responsible for managing the FSMC contract, including the existing responsibilities that cannot be delegated to the FSMC and the new responsibilities that will occur under the FSMC contract;

- ✓ Decide which method of procurement to use in accordance with state and local requirements;

- ✓ Determine if the FSMC will serve sites other than those under the administration of the sponsor (these additional sites must be included in the IFB/RFP);

- ✓ Develop bid/proposal documents. These documents would include the contract for competitive sealed bid procurement, since the contract should be issued as part of the invitation for bid (IFB). Under request for proposal procurement (RFP), all non-negotiable components of the contract should be included in the RFP, as well. In either type of procurement, the contract or contract provisions should be reviewed by the sponsor's legal counsel to ensure legal sufficiency as well as to provide the maximum amount of protection possible to the sponsor.

Food Service Management Checklist
RESPONSIBILITIES RETAINED BY THE SPONSOR

Section B - SFA Responsibilities

Page No.

_____ 1. **Provisions under Program Agreement, §210.16(a)(2)**-ensure that the food service operation is in conformance with the SFA's agreement under the program.

_____ 2. **Signature Authority, §210.16(a)(5)**-retain signature authority on the ADE-SFA agreement, free and reduced price policy statement and Claims for Reimbursement.

3. **Control of the School Food Service Account and Overall Financial Responsibility**

_____ a. **§210.16(a)(4)**-retain control of the nonprofit school food service account and overall financial responsibility for the nonprofit food service operation; and

_____ b. retain control for the establishment of all prices, including price adjustments, for meals served under the nonprofit school food service account, e.g., pricing for reimbursable meals, a la carte service including vending machines, and adult meals.

4. **USDA Donated Foods**

_____ a. **§210.16(a)(6)**-retain title to USDA donated foods; and

_____ b. ensure that all USDA donated foods made available to the FSMC, including processed USDA donated foods, accrue only to the benefit of the SFA's nonprofit school food service and are fully utilized therein. All refunds received from processors must be retained by the SFA.

5. **Quality, Extent and General Nature of Food Service**

_____ a. **§210.16(c)(3)**-provide detailed specifications for each food component or menu item as specified in 7 CFR Part 210, and include these specifications in the IFBs or RFPs. Specifications must cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

_____ b. **§210.16(a)(4)**-retain control of the quality, extent, and general nature of its food service.

_____ c. **§210.16(c)(3)**-make no payment for meals that are spoiled or unwholesome at the time of delivery, do not meet detailed specifications or do not otherwise meet the requirements of the contract.

Section B - SFA Responsibilities

(continued)

Page No.

_____ 6. **Health Regulations, §210.16(a)(7)**-maintain all applicable health certifications and assure that all State and local regulations are being met by a FSMC preparing or serving meals at a SFA facility.

_____ 7. **Monitoring Responsibilities, §210.16(a)(3)**-monitor the food service operation through periodic on-site visits to ensure the food service is in conformance with program regulations.

_____ 8. **Use of Advisory Board, §210.16(a)(8)**-establish and maintain an advisory board composed of parents, teachers, and students to assist in menu planning.

_____ 9. **21-Day Cycle Menu, §210.16(b)(1)**-include a 21-day cycle menu developed in accordance with the meal pattern requirements specified in 7 CFR Part 210.

Section C - FSMC Responsibilities

Page No.

- _____ 1. **Health Certification, §210.16(c)(2)**-maintain all applicable State and/or local health certification(s) for the duration of the contract for any facility outside the school in which it proposes to prepare meals. The FSMC must meet all applicable State and local health regulations in preparing and serving meals at the SFA facility.

- _____ 2. **21-Day Cycle Menu, §210.16(b)(1)**-adhere to the 21-day cycle menu which was included in the IFB or RFP for the first 21 days of meal service. Changes thereafter may only be made with the approval of the SFA.

- _____ 3. **Provision of Free and Reduced Price Meals, §210.16(a)**-in order to offer a la carte food service, the FSMC must also offer free, reduced price and full price reimbursable meals to all eligible children.

- _____ 4. **USDA Donated Foods, §210.16(a)(6)**-to the maximum extent possible, utilize USDA donated foods made available by the SFA solely for the purpose of providing benefits for the SFA's food service operation.

- _____ 5. **Recordkeeping, OMB Circular No. A-102, Attachment 0, paragraph 14.h, ARS §35-214(A) and §210.16(c)(1)**-maintain records to support the SFA's Claim for Reimbursement; make all records available to the SFA upon request; and retain all records for a period of five (5) years after the SFA submits the final Claim for Reimbursement for the fiscal year for inspection and audit by representatives of the SFA, ADE, USDA and Comptroller General, at any reasonable time and place. In instances where audit findings have not been resolved, the records must be retained beyond the 5-year period until resolution of the issues raised by the audit.

- _____ 6. **Reporting, §210.16(c)(1)**-report the claim information to the SFA promptly at the end of each month or more frequently as specified by the SFA.

Section D - General Terms - All SFA-FSMC Contracts

Page No.

1. **Contract Duration**
 - a. **§210.16(d)**-contracts must be of a duration no longer than one (1) year.
 - b. **§210.16(d)**-options for the yearly renewal of a contract may not exceed four (4) additional one-year extensions.
2. **Energy Policy and Conservation Act, OMB Circular No. A-102, Attachment 0, paragraph 14.j**
3. **Termination Clause, §210.16(d)**-either party may cancel for cause with 60-day notification.
4. **Nonperformance Sanctions -OMB Circular No. A-102, Attachment 0, paragraph 14.a**-provisions allowing for administrative, contractual, or legal remedies in instances where the FSMC violates or breaches contract terms, and providing for such sanctions and penalties as may be appropriate.

Section E - SFA-FSMC Contracts in Excess of \$2,500 Involving Food Service Workers Whose Duties are Manual or Physical in Nature

☐ **Indicate** with a check mark (✓) in the block if the following provision is not applicable.

Page No.

- Contract Work Hours and Safety Standards Act, OMB Circular No. A-102, Attachment 0, paragraph 14.f**

Section F - SFA-FSMC Contracts in Excess of \$10,000

☐ Indicate with a check mark (✓) in the block if the following provisions are not applicable.

Page No.

1. **Termination Clause - OMB Circular No. A-102, Attachment 0, paragraph 14.b**
2. **Equal Employment Opportunity - OMB Circular No. A-102, Attachment 0, paragraph 14.c**

Section G - SFA-FSMC Contracts in Excess of \$100,000

☐ Indicate with a check mark (✓) in the block if the following provision is not applicable.

Date Signed

_____ **Debarment, Suspension, Ineligibility and Voluntary Exclusion, 7 CFR 3017.510**-certification regarding debarment/suspension from participating in Federal contracts/grants/awards. A new certification is also required for each renewal period.

☐ Indicate with a check mark (✓) in the block if the following provision is not applicable.

Date Signed

_____ **Certification Regarding Lobbying, 7 CFR Part 3018**-a new certification is also required for each renewal period.

☐ Indicate with a check mark (✓) in the block if the following provision is not applicable.

Date Signed

_____ **Disclosure of Lobbying Activities, 7 CFR Part 3018**-lobbying activities in connection with school nutrition programs must be disclosed. If there are material changes after the Initial filing, updated reports must be submitted on a quarterly basis.

☐ Indicate with a check mark (✓) in the block if the following provision is not applicable.

Page No.

_____ **Clean Air Act, Clean Water Act, and Environmental Protection Agency Regulations, OMB Circular No. A-102, Attachment 0, paragraph 14.i**

Section H - SFA-FSMC Contracts Involving Research, Developmental, Experimental and Demonstration Work

☐ Indicate with a check mark (✓) in the block if the following provision is not applicable.

Page No.

_____ **USDA Rights to Copyrights, Patent Rights and Rights in Data and Reporting of Discoveries and Inventions, OMB Circular No. A-102, Attachment 0, paragraph 14.g**

Section I - Unallowable SFA-FSMC Contract Document Provisions

The following indicate problem areas that have been identified in SFA-FSMC contract documents. The contract documents must be thoroughly checked, regardless of the procurement method used, to ensure that these areas have not been included, in any form. Indicate with a check mark (✓) in each block that the review of the documents indicates that there are no such provisions in the reviewed documents, unless specified below.

Check (✓) as described above.

- ☐ 1. **Cost Plus a Percentage of Cost/Income**-cost plus a percentage of cost/income to the FSMC, however represented.
- ☐ 2. **Duplicate Fees**-fee structures that permit a FSMC to bill management fees and charge the same costs as cost-reimbursable expenses.
- ☐ 3. **Purchasing**-if the SFA does the purchasing, clauses that limit the selection of vendors to only FSMC-approved vendors.
- ☐ 4. **Acceleration Clause**-provisions (multi-year) that require full payment (e.g., program equipment purchases) if the contract is not renegotiated.
- ☐ 5. **Interest Payments**-interest payments to the contractor, however represented, including interest payments for equipment purchases.
- ☐ 6. **Guaranteed Return**-"guaranteed return" provisions unless the "return" remains in the nonprofit food service account. "Returns" cannot be contingent upon multi-year contract duration.
- ☐ 7. **Delegation of SFA Responsibilities**-FSMC responsibility for any of the functions that must be retained by the SFA.
- ☐ 8. **Automatic Renewal**-provisions which automatically renew the contract.
- ☐ 9. **Processing Contracts**-contract document language that permits the FSMC to subcontract USDA donated foods for further processing.

For the item(s) above not checked (✓), indicate item number(s) with corresponding page number(s) of documents where provision(s) appears.

Item Number(s)	Page Number(s)
_____	_____
_____	_____
_____	_____

Section J - Advisable Inclusions

Though the items below are not regulatory in nature, they have been included to offer technical assistance to the SFA in developing contractual language that will ensure that the best interest of the SFA is served by the contract.

Page No.

- _____ 1. **Compliance with Program Regulations**-requirement that the FSMC conduct program operations in accordance with 7 CFR Parts 210, 215, 220, 245 and 250, and FCS instructions and policy.
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2. **USDA Donated Foods**

- _____ a. Method which delineates how the FSMC will pass the value of USDA donated foods used to the SFA.
- _____ b. Specific statement that USDA donated foods are not to be used for special functions conducted outside the nonprofit school food service (e.g., catered meals).
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- _____ 3. **Special Functions**-method which delineates the cost allocation for special functions conducted outside the nonprofit school food service. The method should demonstrate that labor costs are not being double billed for program meals and special function meals.
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4. **Fee Structure**

- _____ a. In a cost-reimbursable contract, requirement for breakdown of administrative and management fees in order to prevent double billing.
- _____ b. Basis for fee adjustments.
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5. **Purchasing**

- _____ a. In a cost-reimbursable contract, if the FSMC makes purchases, the prices charged the SFA must be reasonable and necessary.
- _____ b. A provision stating that any silence, absence or omission from the contract document specifications concerning any point shall be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the SFA are to be used.

Section J - Advisable Inclusions
(continued)

Page No.

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- _____ **6. Certification of Independent Price Determination**-certification regarding non-collusion. This certification may be met through the use of the Certification of Independent Price Determination form (Appendix C).
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- _____ **7. Civil Rights Compliance**-assurance that the FSMC will conform with all civil rights requirements applicable to the SFA.
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- _____ **8. Buy American Provision**-compliance with the Buy American provision under 7 CFR Part 250.
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- _____ **9. Claim Liability**
- _____ a. The FSMC accepts liability caused by FSMC negligence for claims assessed as a result of Federal/State reviews/audits, corresponding with the SFA's period of liability.
- _____ b. The FSMC accepts liability for any negligence on its part that results in any loss of, improper use of, or damage to USDA donated foods.
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- _____ **10. Location of Records**-all FSMC records pertaining to the SFA should be maintained at the SFA while the contract is in effect, and preferably for the required retention period.
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- _____ **11. Nutrition Education**-FSMC responsibility for nutrition education activities, as applicable.